

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-7013

To be argued by
JAMES D. ZIRIN

In the
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

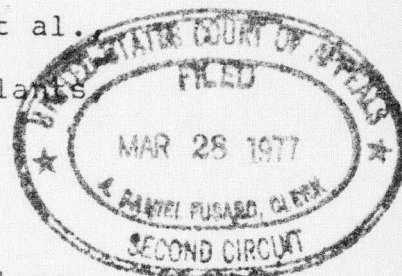
BROWNING DEBENTURE HOLDERS' COMMITTEE, et al.

Plaintiffs-Appellants

-against-

DASA CORPORATION, et al.,

Defendants-Appellees.



ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLEE
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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BROWNING DEBENTURE HOLDERS' COMMITTEE, :
et al., :
 Plaintiffs-Appellants, : Docket Nos. 77-7013
 : 77-7014
 -against- :
DASA CORPORATION, et al., :
 Defendants-Appellees. :
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BRIEF OF DEFENDANT-APPELLEE
ARTHUR ANDERSEN & CO.

Preliminary Statement

This Brief is submitted by defendant-appellee Arthur Andersen & Co. ("Andersen") in response to that portion of the 107-page brief of plaintiffs-appellants Roy E. Brewer and Bradley R. Brewer (the "Brewers")* which seeks reversal of a judgment entered January 17, 1977, in the United States District Court for the Southern District of New York, by the honorable Richard Owen, among other things, dismissing this action as to Andersen and entering judgment against the Brewers and in Andersen's favor for attorneys' fees, and to the brief of plaintiff-appellant Simms C. Browning ("Browning") which takes no position on the dismissal but joins the Brewers in their position on the attorneys' fees aspect.

*The Brewers' original brief contained 291 pages. After this Court directed them to file a brief of 100 pages, the Brewers managed to prune their presentation to its present length which the Court eventually approved.

Other defendants, represented by Jacobs, Persinger & Parker, have submitted a brief which cogently urges affirmance of the judgment below. Rather than burden the Court with duplicative argument, we will here treat only those issues related to Andersen. To the degree that affirmance of the judgment may rest on the arguments made in the Jacobs, Persinger & Parker brief, we adopt such arguments on behalf of Andersen as well.

ISSUES PRESENTED

1. Whether this action, purportedly based on Section 14(a) of the Securities Exchange Act of 1934, was not properly dismissed as to Andersen, in light of the fact that plaintiffs failed either to allege or to establish that Andersen was in any way involved in the solicitation of proxies from security holders.

2. Whether the District Court abused its discretion in granting attorneys' fees to Andersen based on its determination, from all the facts and testimony elicited below and the court's personal observations of all of the plaintiffs throughout the tortured course of the litigation, that this action was vexatious and not brought in good faith.

STATEMENT OF THE CASE

A. The Complaint.

This action, characterized by Judge Owen as an "utterly frivolous claim" (Memorandum and Order dated July 21, 1976, p. 1), was commenced in April, 1972 by Browning and the Brewers, who designated themselves the Browning Debenture Holders' Committee

(the "Browning Committee"), by service upon three of the various named defendants of a prolix, diffuse, almost incoherent class action complaint, as amended (the "Complaint"), totalling some 53 pages and containing 29 paragraphs of allegations, statements of "fact" and other allegedly relevant matter.

Although the Complaint is by no means easy to parse, the gravamen of the plaintiffs' various claims relate to defendant DASA Corporation's ("DASA") proposed sale of certain computer equipment in order to raise cash. To conclude such sale, DASA needed the approval of its debenture holders, including Browning and the Brewers. As an inducement to obtaining the debenture holders' approval, DASA proposed to reduce the conversion price of the debentures from \$42.42 to \$21.00.

Although the real reason for this suit does not readily appear the face of the Complaint, plaintiffs' sole purpose throughout has been to force DASA to lower this conversion ratio. As Judge Owen properly concluded four years after the action was commenced:

"... this entire action was instituted and maintained to use the court as a negotiating tool, without any factual basis for the myriad allegations pleaded against so many parties in the 53 page amended complaint" (Opinion and Order dated January 8, 1976, hereinafter "Jan. 1976 Decision").

The principal parties in this litigation besides plaintiffs, include DASA, a Massachusetts concern manufacturing telephone electrical equipment, the Bank of New York, which acted as Trustee under the Trust Indenture pursuant to which DASA's debentures were issued, and Andersen, which had, as

independent public accountants, audited certain financial statements of DASA.

The Complaint contains five "Claims". The first two allege that the 1972 stockholders' meeting of DASA was invalid, in that certain proxy materials issued in conjunction therewith violated Section 14 of the Securities Exchange Act of 1934 (the "Act") and sought injunctive relief. Judge Motley denied plaintiffs' motion for a preliminary injunction under these first two claims, and subsequently Judge Griesa dismissed such claims as moot in October, 1973. As was typical of their conduct throughout these proceedings, plaintiffs moved to reargue such dismissal five months later, which motion was denied and the denial affirmed on appeal by this Court on October 3, 1975. 524 F.2d 811 (2d Cir. 1975).

The third Claim asserts that a solicitation letter from DASA management to its stockholders violated Section 14(a) of the Act. As regards Andersen, there is absolutely no allegation that it participated in any manner in the preparation or distribution of such letter. In fact, Claim 3, as was the case with Claims 1 and 2, only uses the dragnet term "defendants", and totally fails to name or refer to Andersen. The fourth Claim was asserted against the Bank of New York only. The fifth Claim, purportedly a derivative claim against Andersen, also asserts violations of Section 14(a) of the Act. This claim, however, fails to comply with the requirements of Rule 23.1, Fed.R.Civ.P., regarding demand upon directors and

is thus fatally defective on its face.

B. Prior Proceedings

Although a complete recitation of the progress of this frivolous action would be unnecessarily burdensome for this Court, a brief review of the developments preceding this appeal is necessary to illustrate plaintiffs' conduct and approach.

Despite the voluminous complaint served by Browning and the Brewers, alleging class action and shareholder derivative claims, it has been obvious from the outset that plaintiffs' sole purpose in instituting and pursuing this action has been to exert pressure on DASA to lower the conversion ratio. Initially, plaintiffs attempted to do so by seeking injunctive relief on Claims 1 and 2. As indicated above, Judge Motley denied plaintiffs' application for injunctive relief, noting that:

"In fact, we suspect that much of the motivation for this suit is plaintiffs' desire to bargain defendants to a lower conversion price." 357 F. Supp. 1010, 1012 (S.D.N.Y. 1972).

On May 22, 1972, despite the fact that the sale sought to be enjoined had already been consummated, plaintiffs took an appeal of that denial. This Court dismissed such appeal as moot. 524 F.2d 811 (2d Cir. 1975).

At about this same time, plaintiffs sought class certification, proceeding by order to show cause dated May 19, 1972. This was deferred by Judge Griesa pending discovery and further proceedings to define both the membership of this purported

class and the issues supposedly being pursued on its behalf. Plaintiffs never took discovery.

Shortly thereafter, at Judge Griesa's direction, plaintiffs moved for summary judgment on Claims 1 and 2, which was opposed by DASA and by Andersen, to the extent that Andersen might be treated as party to those Claims. As already indicated above, Judge Griesa dismissed Claims 1 and 2 as against all parties, on the grounds that these Claims stated no valid claim for damages and, in any event, were moot. In his Memorandum and Order dated October 1, 1973, Judge Griesa, echoing Judge Motley's earlier observation, stated that:

"... the real 'injury' which plaintiffs are seeking to cure is their failure to achieve the low conversion price for the debentures ..." (p. 18).

Over five months later, and in clear contravention of Rule 9(m) of the General Rules of the District Court, plaintiffs moved to reargue this dismissal of Claims 1 and 2, which motion was denied by Judge Owen in a Memorandum Decision and Order dated July 16, 1974 ("July 1974 Decision"). In that decision, Judge Owen also denied plaintiffs' renewed motion for class determination - even though they had undertaken no discovery whatsoever in the period of over a year since Judge Griesa's previous denial of a similar motion. In finding that there was no class to be represented, Judge Owen observed that the action

"... involves an attempt by plaintiffs ... to force the management of DASA corporation ... to lower the proposed conversion ratio of DASA debentures" (July 1974 Decision, p. 3)

Plaintiffs, rather than commencing discovery, filed an unprecedented motion for an order permitting depositions to be taken by tape recorder and directing DASA to prepare proposed findings of fact as to Claim 3. This motion was denied by Judge Owen in an order endorsed on the moving papers and entered October 11, 1974.

Despite the patent futility of appealing the 1973 dismissal of Claims 1 and 2, plaintiffs thereupon undertook an appeal which was decided against them by this Court. 524 F.2d 811 (2d Cir. 1975).

Plaintiffs' harassment of the defendants continued into the spring of 1975, when they moved for summary judgment on Claim 4 and partial summary judgment on Claim 3. This motion with respect to Claim 4 was denied from the bench on March 28, 1975. With respect to Claim 3, the motion, premised on a violation of Section 5 of the Securities Act of 1933 - a claim nowhere made in the Complaint - was denied in Judge Owen's Memorandum Opinion of April 16, 1975. Plaintiffs also applied to this Court in March, 1975, for an order "in the nature of mandamus" staying the trial of the action, which was denied from the bench on April 1, 1975.

Andersen moved on April 1, 1975 for an order dismissing so much of the remainder of the Complaint as related to it, which motion was granted by Memorandum and Order dated April 18, 1975 ("April 1975 Decision").

Notwithstanding this decision that Andersen was no longer a party to the action, plaintiffs continued to harass Andersen, serving upon Andersen a dragnet subpoena allegedly pursuant to Rule 45, Fed.R.Civ.P., by which plaintiffs attempted to require the appearance of Andersen witnesses resident in Boston at a trial in the Southern District of New York and to compel prodigious document production. Andersen moved to quash the subpoena, and its motion was granted by Judge Owen on May 12, 1975.

Plaintiffs next filed a Notice of Appeal related to, inter alia, the orders dismissing Andersen and quashing the subpoenas, and then sought, by motion, to adjourn the perfection of the appeal until after completion of the impending trial. Andersen was again forced into the proceedings to oppose this motion and was successful in its motion to dismiss the appeal in toto, which was granted by this Court on June 24, 1975.

A more detailed history of the excessive and spurious motion practice, harassment and overall abuse of the judicial process engaged in by plaintiffs throughout this litigation is outlined in Judge Owen's Opinion and Order of January 8, 1976, as supplemented by his Memoranda and Orders of July 21, 1976

and January 3, 1977 and by the civil docket for this case. Since Judge Owen's January, 1976 decision, plaintiffs have continued to engage in similar vexatious conduct, as is evidenced by submission of two verbose briefs, one of which was, as originally submitted, so far in excess of any reasonable bounds that it was rejected.

C. The Claims Against Andersen

Given the early dismissal of Claims 1 and 2, the only remaining claims in the Complaint which involve Andersen are Claims 3 and 5.

As regards Claim 3, Andersen is not even named as a party therein, and is only arguably a party thereto, by virtue of the single reference in the fourth line of Paragraph 22 to "defendants." This Claim centers upon a solicitation letter sent by DASA to its security holders. Nowhere is it alleged that Andersen took any part in the preparation of such letter. Furthermore, Claim 3 is based upon Section 14(a) of the Act which is applicable only to a person who solicits or permits the use of his name to solicit a proxy, consent or authorization with regard to a security (15 U.S.C. § 78 n(a)). Nowhere does plaintiff allege or even imply that Andersen engaged in such activity.

Claim 5, against Andersen by name, is purportedly derivative in nature and arises out of the allegation that

Andersen's report, dated January 7, 1971, with regard to DASA's audited financials for the year ending October 31, 1970, has no exception with respect to an asset item entitled "Excess of Purchase Price Over Net Assets Acquired", while Andersen's report for the next fiscal year, dated January 10, 1972, does contain a qualification as to such item. It is obvious from an examination of DASA's 1971 Annual Report that the consolidated financial statements presented therein included an auditor's report prepared by Andersen, which contained, inter alia, the following statement:

"As is more fully explained in Notes 1 and 3 to the consolidated financial statements, the Excess of Purchase Price Over Net Assets Acquired, stated at \$1,500,000 in the accompanying balance sheets, relates primarily to the Company's field service organization. The realization of this intangible asset is dependent on the future success of the Company's plans for utilizing this field service organization.

"In our opinion, subject to the realization of the intangible asset referred to in the preceding paragraph, the consolidated financial statements referred to above present fairly the consolidated financial position of DASA Corporation and subsidiaries as of October 31, 1971 and 1970, and the results of their operations and the changes in their financial position for the years then ended, in conformity with generally accepted accounting principles applied on a consistent basis during the years". (§ 24, p. 8, Affidavit of James D. Zirin, sworn to April 1, 1975, annexed to Andersen's Notice of Motion, dated April 1, 1975).

Plaintiffs in no way criticize this statement, nor anything else in DASA's financial statements or Annual Reports, but merely assert the obvious - that there is a difference between the 1970 and 1971 Reports. Plaintiffs fail even to assert any damages whatsoever by reason of Andersen's conduct.

Quite apart from the foregoing, is the fact that plaintiffs have failed to allege that any demand was made on the directors of DASA to claim against Andersen, nor any reasons for failing to do so. This failure renders their purported derivative claim against Andersen wholly insufficient under Rule 23.1, Fed.R.Civ.P., which requires that the reasons for excusing demand must be alleged "with particularity."

Andersen moved to dismiss the Complaint as against it, which motion was granted by Judge Owen. In his Memorandum and Order dated April 18, 1975, granting such motion, Judge Owen held in pertinent part:

"There is no allegation in Claim 3 of any wrongful conduct on the part of Andersen, either in respect to its having participated in the solicitation letter from DASA to its securities holders, or more importantly that it engaged in any act constituting solicitation. Such a defect in the pleadings is fatal to plaintiffs' claim under Section 14(a)" (Opinion, 4/18/75, at 3).

* * *

"Claim 5, though purporting to be brought derivatively against Andersen, and in addition to alleging insufficient facts to proceed from Andersen's actions to any damage to any party, is also devoid of the necessary allegations mandated by Rule 23.1 Plaintiffs' failure to comply is therefore fatal. (Id. at 4-5).

* * *

"In view of the foregoing, defendant Andersen's motion to dismiss the complaint as to all pending claims asserted against it is granted." (Id. at 6).

D. The Award of Attorneys' Fees To Andersen.

In his principal opinion in this case, rendered after the conclusion of the six-day trial, Judge Owen, after disposing of all of the remaining claims asserted by plaintiffs against the defendants still in the case, proceeded to discuss at great length the question of plaintiffs' good faith in instituting and maintaining the action (pp. 12-21, Jan. 1976 Decision). He concluded that defendants ". . . DASA Corporation and the Bank of New York should be reimbursed for attorneys' fees occasioned by the improper conduct of plaintiffs in this action" (Id., p. 21).

On the basis of Judge Owen's factual findings and holding in that decision, Andersen moved for attorneys' fees inasmuch as it was equally subjected to all of plaintiffs' "'unnecessary, groundless, vexatious and oppressive petitions and motions'". [Id. p. 20, citing Local 149, U.A.W. v. American Brake Shoe Co., 298 F.2d 212, 214 (4th Cir.), cert. denied, 369 U.S. 873 (1962)]. Judge Owen granted Andersen's motion, stating:

"It is clear from the record that defendant Arthur Andersen & co. had been similarly a victim of an utterly frivolous claim." (Memorandum and Order dated July 21, 1976, p. 1).

Subsequently, Andersen, as well as DASA and Bank of New York, submitted detailed, comprehensive affidavits of legal services with supporting documentation, as required by this Court's ruling in City of Detroit v. Grinnell Corp., 495 F.2d 448, 471 (2d Cir. 1974). Andersen's application showed a total

of 233.8 hours expended by attorneys* for which Andersen had paid approximately \$17,367. Judge Owen, after reviewing all these submissions and holding a full evidentiary hearing on the matter, awarded Andersen a total of \$7,000 in attorney's fees, excluding both costs and any attorneys' fees and related costs incurred by counsel in responding to the seemingly endless appeals taken by plaintiffs (See Memorandum and Order dated January 3, 1977, pp. 2-4).

I.

ALL OF THE PLAINTIFFS' CLAIMS AGAINST
ANDERSEN WERE PROPERLY DISMISSED

Section 14(a) of the Act makes it unlawful for any person

"to solicit or to permit the use of his name to solicit any proxy or consent or authorization"
(15 U.S.C. § 78n (a))

The Rules promulgated pursuant to the foregoing provision define the term "solicit" as including

"(i) Any request for a proxy . . . ;

"(ii) Any request to execute or not to execute, or to revoke, a proxy; or

"(iii) The furnishing of a form of proxy or other communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy."
Rule 14a-1(f)(1), 17 C.F.R. § 240.14a-1(f)(1).

The definition section also provides that the term "solicit" does not apply to, among other things,

*Compensation for 99.3 hours of time expended by paralegal personnel was not sought by Andersen.

"the performance by any person of ministerial acts on behalf of a person soliciting a proxy."
Rule 14a-1(f)(2), 17 C.F.R. § 240.14a-1(f)(2).

Thus, although a private right of action exists for a violation of Section 14(a), there is no right of action against one who did not "solicit" within the meaning of the foregoing provisions. See Iroquois Industries, Inc. v. Syracuse China Corp., 417 F.2d 963, 970 (2d Cir. 1969), cert. denied, 399 U.S. 909 (1970); Gould v. American Hawaiian Steamship Co., 351 F.Supp. 853, 865 (D.Del. 1972); Robbins v. Banner Industries, Inc., 285 F.Supp. 758, 761-62 (S.D.N.Y. 1966).

Since Judge Owen specifically determined that there were no allegations, much less proof, that Andersen, an auditing firm, engaged in any acts constituting solicitation, (April 1975 Decision, p. 3), he properly dismissed Claim 3 as to Andersen.

Even assuming, arguendo, that Andersen was in some manner involved in the preparation of the challenged solicitation letter or its content, there would be no basis for a claim against it under Section 14(a) of the Act. As the court in Gould, supra, recognized,

"Section 14(a) imposes liability on individuals soliciting proxies, and not on the attorneys or accountants preparing them."*

Here, of course, there was no allegation, much less a finding, that Andersen prepared the challenged solicitation letter which in fact was prepared and distributed entirely by DASA management.

*Unless otherwise indicated, all emphasis has been supplied.

Turning to the fifth Claim, which purports to be brought derivatively, the claim against Andersen is unaccompanied by any of the allegations required by Rule 23.1 of the Federal Rules of Civil Procedure regarding demand upon directors, namely that,

"The complaint shall . . . allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort".

It is apparent from the face of the Complaint, and Judge Owen so found, that there was no compliance whatever with the requirements of the Rule in respect of the derivative claim asserted against Andersen (April 1975 Decision, pp. 4-6).

The necessity of a shareholder demand prior to the commencement of a derivative action arises from the fundamental principle that a decision to pursue a claimed right of a corporation is primarily vested in the corporate directorate and hardly needs discussion. Even when corporate action is being challenged, as is not the case with the instant claim against Andersen, a plaintiff who would assert a derivative claim must initially have sought action from the directors, or plead an adequate excuse for not having done so. The applicable law was recently summarized by the United States Court of Appeals for the First Circuit:

"Rule 23.1 is not an ordinary, but an exceptional rule of pleading, serving a special purpose, and requiring a different judicial approach. Socially desirable as minority stockholders' actions may be thought to be, see Emerson and Latchman, Shareholder Democracy ch. VIII (1954); *Pomerantz v. Clark*, D.Mass., 1951, 101 F.Supp. 341, 346, it is normally the directors, not the stockholders, who conduct the affairs of the company. Hence, to be allowed, sua sponte, to place himself in charge without first affording the directors the opportunity to occupy their normal status, a stockholder must show that his case is exceptional. His initial burden is to demonstrate why the directors are incapable of doing their duty, or as the Court has put it, to show that "the antagonism between the directory and the corporate interest ...be unmistakable." *Delaware & Hudson Co. v. Albany & Susquehanna R.R.*, 1909, 213 U.S. 435, 447, 29 S.Ct. 540, 543, 53 L.Ed. 862. This has long meant, as the Court stated in *Hawes v. Oakland*, 1881, 104 U.S. 450, 26 L.Ed. 827, cited in *Delaware*, that the 'cause of failure [to induce corporate action] ...should be stated with particularity.' 104 U.S. at 461, 26 L.Ed. 827. See also *Wathen v. Jackson Oil & Refining Co.*, 1915, 235 U.S. 635, 639-40, 35 S.Ct. 225, 59 L.Ed. 395.

"Rule 23.1 - 'The complaint shall also allege with particularity...the reasons for...not making the [demand]' - is thus the embodiment of a long-standing principle, or, as the Massachusetts court said in a parallel case, *Bartlett v. New York, N.H. & H. R.R.*, 1915, 221 Mass. 530, at 538, 109 N.E. 452 at 456, 'It is not a technical rule of pleading, but one of substantive right.' Whether the word 'substantive' is exact, it is clear that the 'particularity' must appear in the pleading itself; the stockholder may not plead in general terms, hoping that, by discovery or otherwise, he can later establish a case. Indeed, if the requirement could be met otherwise, it would be meaningless." *In re Kauffman Mutual Fund Actions*, 479 F.2d 257, 263 (1st Cir.), cert. denied, 414 U.S. 857 (1973).

These requirements imposed by Rule 23.1 may not be by-passed or ignored. As the decision in *Kauffman, supra*, makes clear, they are not technical averments, but rather control the

substantive right of the plaintiff to bring the suit. If a purported derivative complaint fails adequately to plead that the alleged claim has been duly presented to the directors, or that the directors would be incapable of exercising an unprejudiced judgment as to whether to pursue it, the complaint must be dismissed. Hawes v. Oakland, 104 U.S. 450 (1881); Corbus v. Alaska Treadwell Gold Mining Co., 187 U.S. 455 (1903); United Copper Securities Co. v. Amalgamated Copper Co., 244 U.S. 261 (1917); Swanson v. Traer, 249 F.2d 854, 856-859 (7th Cir. 1957); Ash v. IBM, 353 F.2d 491, 493 (3d Cir. 1965), cert. denied, 384 U.S. 927 (1966); Nussbacher v. Continental Illinois Bank & Trust Co., 61 F.R.D. 399 (N.D. Ill. 1973).

As these authorities confirm, a derivative plaintiff, who has failed to seek action from the directors, must set forth in his pleadings the reasons why he has made no such effort, and must demonstrate that the directors have such disabling bias or conflict of interest that they could not be expected to give such a demand responsible consideration. The decision in Ash, supra, succinctly described the governing law:

"The Supreme Court and, following it, the Court of Appeals have repeatedly stated and applied the doctrine that a stockholder's derivative action, whether involving corporate refusal to bring antitrust suits or some other controversial decision concerning the conduct of corporate affairs, can be maintained only if the stockholder shall allege and prove that the directors of the corporation are personally involved or interested in the alleged wrongdoing in a way calculated to impair

their exercise of business judgment on behalf of the corporation, or that their refusal to sue reflects bad faith or breach of trust in some other way." (353 F.2d at 493).

No such allegations are made with respect to the claim here involved. Indeed, though certain present and former directors of DASA were named in the complaint, such directors have never even been served. Furthermore, the complaint does not challenge any corporate action; its nature is not such that directors have a disabling conflict of interest. The derivative claim asserted against Andersen is that of a corporation against its independent auditors, and does not even involve any potential claims of bad faith as against the directors.

Significantly, the Complaint does not so much as allege that a demand on the directors to bring that claim would be futile or unavailing. Even if such an allegation were made, it would still be insufficient to comply with the Rule in the absence of particularized pleaded facts which would support it. As this Court emphasized in Brody v. Chemical Bank, 482 F.2d 1111 (2d Cir.), cert. denied, 414 U.S. 1104 (1973), a complaint in a derivative action "must comply with Rule 23.1." Id. at 1114.

Here, as in Brody, there is nothing to indicate that the directors could not exercise an ordinary business judgment as to whether to assert the claim in question, or why they should not be afforded the normal opportunity to do so. Moreover, in the instant case there is not even an attempt to plead

compliance with the Rule. The holding in Brody applies a fortiori to the case at bar.

To rebut the clear factual and legal bases cited by Judge Owen below in his opinion dismissing all claims against Andersen, the Brewers have included in their revised brief a short, wholly unsubstantiated discussion with a reference to the rambling "factual" discourse of some ten pages entitled "Origin of the \$1.5 Million 'Phantom Asset'" contained in their original brief of March 7, 1977 (Footnote, p. 11, Brewer Br.), and an equally prolix legal discussion of some thirteen pages (pp. 45-57, Brewer, Br.).

The thrust of the Brewers' "factual" discourse appears to relate to the difference in the accounting treatment of an asset item, "Excess of Purchase Price Over Net Assets Acquired (Notes 1 and 3)", as reflected in the DASA financial statements contained in DASA's Annual Reports for years 1970 and 1971, which included in each case an audit report of Andersen. The actual content of the Brewers' discussion, however, is an unintelligible amalgam of unsubstantiated assertions, wild speculation, and irrelevancy, which the Brewers completely fail to connect to the merits, if any, of their claim, namely that the 1972 proxy solicitation relating to DASA's sale of certain assets was allegedly violative of Section 14(a) of the Act.

Although the Brewers cavil at this asset item of \$1,500,000, appearing on the audited consolidated balance sheets contained in DASA's 1971 Annual Report to Stockholders

(Trial Exhibit 32), Footnotes 1 and 3 to DASA's consolidated financial statements make clear that such asset has no tangible value and depends on the profitable utilization of DASA's field service organization. Footnote 3, in particular, makes clear that the Board of Directors of DASA "reviewed this intangible asset and determined that, based on the current and anticipated future level of earnings in relation to the net tangible assets employed in this business, the current and anticipated uses for CTI's field service organization as well as other factors, this asset had a value of \$1,500,000." Andersen's opinion dated January 10, 1972, covering the consolidated financial statements, was qualified and made expressly subject to the "realization of this intangible asset" which realization was stated to be "dependent on the future success of the Company's plans for utilizing this field service organization."

In light of the uncertainty which was fully disclosed relative to this intangible asset, it is totally absurd for plaintiffs to claim that there was anything remotely misleading about the accounting treatment. Indeed, plaintiffs have never explained to the Court or anyone else what their theory is with respect to this asset item, how it is claimed to have misled them, or what injury they incurred by reason of the alleged deception. The record below in fact shows that the difference in accounting treatments in the two years referred to by the Brewers did appear in DASA's 1970 and 1971 Annual Reports but

were not included as part of the challenged proxy solicitation which contained only the 1971 audited financial statements covered by Andersen's qualified opinion; that the difference between the 1970 and 1971 accounting treatment of the asset in question has never been connected, directly or indirectly, to any element of the allegedly deficient solicitation; and that no damages are even claimed to have been suffered by the Brewers as a result of this difference in accounting treatment. In addition, although the Brewers claim that Andersen's accounting treatment was both improper and done in collusion with DASA, they made no effort to discover any facts from Andersen which might have been relevant to this accounting treatment, nor have they presented any facts by way of personal knowledge or expert opinion, to rebut Andersen's contention that this treatment was entirely correct.

As regards legal authorities cited by the Brewers (Point III, pp. 45-57, Brewer Br.), they are numerous, but in toto, irrelevant. For example, Gissen v. Colorado Interstate Corp., 62 F.R.D. 151 (D.Del. 1974), is cited by plaintiffs to support their contention that Andersen "owed a statutory duty to the stockholders and the bondholders by Section 14(a) and the Proxy Rules . . . " (p. 177, Brewer Br.). Plaintiffs note that in Gissen, the corporate auditors' motion to dismiss the complaint on its face was denied. However, they conveniently fail to point out that such motion was denied because the Gissen plaintiffs set forth particular allegations as against the auditors, including allegations that the auditors did not reasonably

believe their representations to be true, and that such representations were made with the intent to induce shareholders to act, all of which the Gissen court relied upon. Here, the Brewers, while acknowledging that no such express pleadings were made (Brewer Br., p. 46), nevertheless cite Gissen to support a theory of accountants' liability which that case does not even address.

Plaintiffs have totally failed to set forth any facts upon which Andersen's liability might be predicated. Hence, the Brewers' extensive citation of cases in which auditors have been held liable under various provisions of the Act (footnote, p. 47, Brewer Br.) is completely irrelevant with respect to the dismissal of Andersen in the instant case.

The irrelevancy of the Brewers' other arguments is further evidenced by their discussion and citation of authorities dealing with the concept of "notice" pleading (Brewers' Br., pp. 48-49). They cite Sundstrand Corp. v. Standard Kollsman Industries, Inc., 488 F.2d 807 (7th Cir. 1973), Conley v. Gibson, 355 U.S. 41 (1957) and United States v. Employing Plasterers Ass'n, 347 U.S. 186, 189 (1954), all of which support the concept that a party need only give notice of his claims to an adversary, and not necessarily detail the facts upon which such claim is based. This argument is specious here, since the dismissal of Andersen was not predicated on a lack of particularization of claims as to which there was no notice, and because the defect in the complaint lay not only in the absence of detail, but also

in the total lack of averments upon which any liability of Andersen might be founded.

The Brewers' citation of authority to support their argument that the dismissal below of Claim 5 was in error (Brewer Br., p. 50) is equally inapposite. In claiming that a demand on DASA that it sue Andersen would have been futile, the Brewers cite Barr v. Wackman, 36 N.Y. 2d 371 (1975); Boyko v. Reserve Fund, Inc., 68 F.R.D. 692 (S.D.N.Y. 1975); In re Kauffman Mutual Fund Actions, supra. These cases, however, fail to support the Brewers' argument that their unilateral determination as to the "presumptive futility" of a demand on DASA was sufficient to excuse their making such a demand. In fact these cases, as well as others which we have previously discussed (supra, pp. 14-19), support the plain meaning of Rule 23.1, Fed.R.Civ.P., requiring either demand or particularized allegations of circumstances which would excuse demand. Furthermore, some of the very cases now cited by the Brewers affirm that the determination of the futility of a demand is not one within their province to make. As was pointed out in Barr v. Wackman, supra, (Brewer Br., p. 50):

"We believe the better approach in these cases is to rest the determination of the necessity for a demand in the sound discretion of the court to which the issue is first presented, to be determined from the sufficiency of the complaint, liberally construed."

Thus, the Brewers' have totally failed to cite any authorities supporting their claim on appeal that the dismissal

as to Andersen was erroneous. In fact, the numerous cases cited are either irrelevant with regard to the pertinent areas of inquiry in this appeal or, actually support positions contrary to those taken by the Brewers.

Without reviewing in detail the remaining "authority" discussed by the Brewers, suffice it to say that the Brewers cite no cases to contradict the principal legal finding below, namely that one who does not participate in a proxy solicitation cannot be liable under Section 14(a) of the Act (April 1975 Decision, pp. 3-4 and cases cited therein). On the basis of the foregoing, the District Court was clearly supported by both the record and applicable law in its dismissal of all of the relevant claims as against Andersen.

II.

THE AWARD OF ATTORNEYS' FEES WAS APPROPRIATE AND WELL WITHIN THE DISCRETION OF THE DISTRICT COURT

A. Plaintiffs Brought And Conducted The Action In Bad Faith.

The record in this case is replete with evidence of plaintiffs' bad faith in initiating this action.

The sole reason for the commencement of this litigation was the desire of plaintiffs to reduce the conversion price from that proposed by DASA's management, namely \$21.00, to one acceptable to plaintiffs, namely something in the range of \$6-\$12. As Browning, himself a seasoned professional securities analyst, testified at trial:

"Q. If DASA had reduced the [conversion] price..., the suit would not have been commenced?

"A.Yes." (Trial Transcript of June 2, 5, 1975 ("TT"), p. 196)

Judge Owen recited at some length in his Opinion of January 8, 1976 (pp. 12-22), and we have previously summarized above (pp. 4-12), the vexatious conduct of plaintiffs which has resulted in substantial expense to all defendants. Plaintiffs' pursuit of Andersen is particularly unprincipled, in that its inclusion in this case was wholly unnecessary, and thus clearly motivated by bad faith. We do not intend to restate all of the factual bases upon which Judge Owen concluded that all of the plaintiffs should be held liable to defendants for their conduct, for they are adequately summarized by Judge Owen (January 1976 Decision, pp. 12-21), as well as by counsel for DASA in their brief. Even a cursory review of the docket in this case indicates that plaintiffs initiated or caused one or more of the defendants to initiate well over 30 motions, all of which defendants essentially won, and launched some six appeals or applications to this Court (including the present one), consuming vast amounts of judicial time to decide questions which were often moot, specious or untenable.

Under these circumstances, Judge Owen properly granted all of the defendants a reasonable amount of the attorneys' fees which had been incurred over the protracted course of this totally frivolous litigation in the exercise of his equitable

power. Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939),
Hall v. Cole 412 U.S. 1 (1973). As the Supreme Court in Hall
v. Cole, supra, recognized,

"... it is unquestioned that a federal court may award counsel fees to a successful party when his opponent has acted 'in bad faith, vexatiously, wantonly, or for oppressive reasons.' . . . In this class of cases, the underlying rationale of 'fee shifting' is, of course, punitive, and the essential element in triggering the award of fees is therefore the existence of 'bad faith' on the part of the unsuccessful litigant." Id. at 4-5 (citations omitted).

The Brewers originally submitted over forty pages of argument against this very principle which the Supreme Court recognizes as "unquestioned." In their revised brief which devotes some 20 pages to this point,* they continued to argue that the fee award here is "untimely," citing cases involving counterclaims grounded in the tort of malicious prosecution. This argument is spurious on its face, for no counterclaims have even been asserted, and the award was in no way based on a tort claim.

The Brewers also assert that the fee award against plaintiffs violates their constitutionally protected rights to petition the courts and to due process. The authorities

*It should not be surprising that plaintiffs have not substantially reduced the length of their arguments as regards dismissal of Andersen or the award of attorneys' fees, resorting rather to smaller margins, the extensive use of large single-spaced footnotes and repeated references to their original brief.

cited however, principally Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), United Mine Workers v. Pennington, 381 U.S. 657 (1965), and F.D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116 (1974) lend no support whatsoever to the existence of a Constitutional right to manipulate the judicial process "in bad faith, vexatiously, wantonly, or for oppressive reasons". F.D. Rich Co. v. Industrial Lumber Co. at 129.* In the first two cited cases, the Supreme Court concluded that to protect the Constitutionally sanctioned rights of association and of petition, groups with common interests must be allowed to use the legislative and judicial processes to advocate their causes without fear that such activities may be violative of the antitrust laws. California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510-11 (1972). However, the Supreme Court also explicitly recognized that there can be no Constitutional protection when the use of the judicial system "...is a mere sham to cover what is actually nothing more than an attempt to interfere directly with ... business

*We note for the record that the Brewers cite the Rich case for the constitutionally sanctioned "principle of free advocacy" (Brewer Br., p. 94). In Rich, the Supreme Court makes absolutely no reference to First and Fifth Amendment rights, and the actual language used by the Court in discussing the countervailing considerations involved in awarding attorneys' fees relates to independent and not free advocacy is as follows:

"Finally, there is the possibility of a threat being posed to the principle of independent advocacy by having the earnings of the attorney flow from the pen of the judge before whom he argues." Id.

relationships..." Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., supra at 144. Recognizing this exception, the Supreme Court has held in a case actually cited by Browning (Browning Br., p. 22), that a petitioner cannot avoid penalties for abusing the judicial process by seeking refuge under Constitutional protections:

"There are many other forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations. Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process. Opponents before agencies or courts often think poorly of the other's tactics, motions, or defenses and may readily call them baseless. One claim, which a court or agency may think baseless, may go unnoticed; but a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused." California Motor Transport Co. v. Trucking Unlimited, supra at 513.

In sum, the Brewers and Browning seek to embrace the broad Constitutional principle outlined in these cases, while purposefully ignoring the clear exception recognized therein where abuse of the judicial process arises, an exception clearly applicable to their conduct in this case. As Judge Owen properly noted, citing this Court's decision in Alland v. Consumers Credit Corp., 476 F.2d 951 (2d Cir. 1973),

"Appellee's course of conduct in this action manifests an intention to use our already over-crowded court dockets and the time-consuming judicial process as means to securing financial advantage. Such conduct bespeaks a willingness, therefore, to abuse the processes of the federal court system. This alone might well provide adequate grounds for awarding reasonable attorney's fees to one in appellant's position." Id. at 958.

The Brewers also argue that the absence of appropriate legal or statutory authority for such an award precludes the granting of such award to defendants here. This argument, however, ignores the teaching of Hall v. Cole, supra, that the awarding of attorneys' fees may be based on various grounds, one being statutory, another being equitable. This principal, which the Hall court deemed "unquestionable," has been reiterated by the Supreme Court in a case extensively cited by the Brewers:

"The federal judiciary has recognized several exceptions to the general principle that each party should bear the costs of its own legal representation. We have long recognized that attorneys' fees may be awarded to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons...." (footnote omitted; F. D. Rich Co. v. Industrial Lumber Co., supra at 129).

An award of attorneys' fees under these circumstances can only be overturned upon a showing by appellants that the ruling below constituted an "abuse of discretion." In Re Boston & Providence R.R. Corp., 501 F.2d 545, 549 (1st Cir. 1974). The standard of review to be applied was appropriately stated by the First Circuit:

"We would find abuse of discretion only if we saw no reasonable ground on which the court could rest a finding of vexatiousness." Id. at 549-50.

The Brewers have failed to show that "no reasonable ground" existed for the award, hence the award of attorneys' fees to Andersen must be affirmed.

B. The Brewers Are Liable
For Attorneys' Fees

All of the foregoing facts and determinations apply

directly to the Brewers who were two of the plaintiffs and members of the Browning Committee. Clearly, Bradley Brewer, as a plaintiff and as counsel is so liable for he must be charged with designing plaintiffs' basic strategy.

In the case of Roy Brewer, Bradley Brewer's father, liability also lies. It has been held that one who so much as lends his name to an action has a responsibility to maintain contact therewith, and if he fails to do so, his ignorance or even his good faith as regards the initiation of such action is no defense to an award of attorneys' fees against him if the pursuit of such action constituted an abuse of the legal process. As was stated in Gazan v. Vadsco Sales Corp., 6 F.Supp. 568 (E.D.N.Y. 1934), wherein upon defendant's application for \$5,000 attorneys' fees, the Court awarded defendants \$2,000 therefor:

"The plaintiff testified that he had never read the complaint, did not know what it contained, and was unaware of the charges made over his name in the complaint against the defendant corporation; that he had not contributed to the expenses of the litigation; that he did not know any of the information that was contained in the complaint, nor did he give such information to the plaintiff's attorney, nor did he know in what manner his counsel obtained the information for the purposes of preparing the complaint.

"Apparently the plaintiff gave the use of his name to others for the purpose of instituting this action. This action was brought without any basis, and was vexatious and oppressive. It was brought solely for the purpose of annoying and harassing the defendant corporation and its business.

* * *

"Plaintiff in bringing this action has been engaged in a fishing expedition in waters in which he was not familiar as he testified he had not even read the complaint, did not know its contents, or anything about the facts alleged. Every fisherman, including novices, realizes that any one who contemplates a fishing trip must be prepared to pay the expenses."

Judge Owen properly determined that good faith is not relevant, relying upon the Supreme Court's finding in Link v. Wabash R.R. Co., 370 U.S. 626 (1962), where, after a case had been dismissed because of counsel's unexcused neglect, the Court held that:

"There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'" (Link v. Wabash R.R. Co., 370 U.S. 626, 633-34, (1962), as cited in July 1976 Decision, p. 3).

The client's sole remedy here, as Judge Owen noted, may well be against his attorney (Id. p. 3, n.4).

C. Browning Is Equally
Liable For Attorneys' Fees

Plaintiff Browning was represented by plaintiff Bradley Brewer from the commencement of this action in April, 1972, until January 28, 1976 -- a period of almost four years. At that time, long after a substantial amount of the vexatious and oppressive nature of this litigation had been visited upon

all defendants, particularly Andersen, and after the entire action was dismissed except for a determination of the attorneys' fees to be awarded the principal defendants, he substituted counsel. Now he seeks to disassociate himself entirely from those efforts, and, claiming good faith and essentially no conduct during the course of this case, wishes to be relieved of any financial liability to Andersen. His lengthy protestations of innocence and naivete are totally belied by the record.

Browning's testimony at the trial reveals that he is a sophisticated financial analyst having graduated from Dartmouth College in 1962 with a B.A. in economics, and received an M.B.A. from its Amos Tuck School of Business Administration in 1973 (TT, p. 3). An expert in corporate financial analysis and a chartered financial analyst (TT, p. 4, 19), Browning testified that he was "familiar with the course of this action since its inception in 1972" (TT. p. 2), and fully participated in the formation of the nominal party defendant, the Browning Committee.

"Q. (By DASA's counsel): Whose idea was it to organize this [plaintiff] Browning Committee?

"A. I would have to say that it was a decision which I took part in and which the Committee took my name. It was a decision made over a brief period of time after we tried to discuss things with the company.

"Q. It was made jointly?

"A. Yes, I think I would have to say it was made jointly. I had asked Mr. Brewer to find some things out for me and, you know, we had proceeded on that ground." (TT, p. 207).

Browning's real intention in this litigation, despite all the verbiage of the Complaint, is indicated by the following testimony:

"Q. (By Bradley Brewer): Were there discussions near the end of January, the beginning of February 1972 about the possibility of the commencement of litigation on your behalf against DASA Corporation?

"THE COURT: Discussions with who?

"Q. Did you discuss it with me or discuss it with anyone?

"A. I'm not sure we were talking about litigation at that juncture. I, hopefully, though that we would be communicating with rational, intelligent people at DASA and really I wasn't questioning anything. I had a lot of questions about the financial condition of the company, but I was only really interested in knowing how they would go about setting new terms for the conversion." (TT, pp. 41-42).

The record reveals that Browning was actively involved prior to the actual commencement of the litigation participating in the preparation of: (1) a submission to DASA for inclusion with its proxy material for the February 29, 1972 Annual Meeting (TT, pp. 66-67), (2) a proposed statement for inclusion in DASA's March 9, 1972 solicitation letter (TT, pp. 85-86) and (3) a debenture-holders' proposal submitted on March 21, 1972 (TT, pp. 89, 184). On May 8, 1972, he attended a meeting at the SEC with regard to DASA's solicitation, after the commencement of this action (TT, pp. 92-93). He was thus undoubtedly in the thick of things.

Although Browning asserts the defense of "good faith", assuming arguendo it is even applicable (supra., pp. 29-30), his own testimony completely undermines such defense. For example, after acknowledging that his own attorney had indicated in

writing that the proposed sale of equipment by DASA pursuant to the proxy solicitation was vital to DASA's survival (TT, pp. 188-190), he admitted that the March 16, 1972 Browning Committee proposal to DASA included a threat to initiate litigation which might in fact delay or prevent the proposed sale entirely (TT, p. 190-191). In an effort to explain these inconsistent positions, Browning testified as follows:

"Q. (By DASA's Counsel): * * *

So it was your position that the sale of the computer assets was vital to the interest of DASA and the security holders, isn't that so, from these statements?

"MR. BREWER: Objection.

"THE COURT: Overruled.

"A. There are three statements here that you have listed which clearly are coming at the point from different angles. Simply this last statement, the litigation was just all -- I felt that management -- that we were trying to fairly describe what might happen and just what might happen.

"We didn't know it could happen or would happen or we are trying to be fair to everyone with the effect that, you, know, if they did not agree to a lower conversion price that it was our thought to proceed with the litigation and that if litigation did stop the sale that, yes, it might be damaging to the corporation, to the equity holders and the debenture holders. It might be." (TT, p. 191).

And further:

"Q. (By DASA's Counsel: If the plaintiffs' position was that this sale was so vital to DASA's continued operation, why did the Browning committee sue and enjoin it?

"A. Because it was so vital to DASA's continuing operations, I, having the belief that the company was insolvent, in trying to protect my own interest and the interest of the debenture holders felt that if it could be forced into bankruptcy we might get a better management and in a liquidation, if that did take place -- that is only a question -- if that did take place we would probably end up with as much or more than we would in a continuing operation." (TT, p. 193)

Clearly, Browning's purpose had no relationship to allegedly defective solicitation materials, but rather his motivation in bringing this litigation was wholly selfish in that he wished to force changes in the conversion ratio and perhaps DASA's management which he deemed necessary. All of the allegations as to violations of Section 14 of the Act, particularly as regards Andersen, were a sham and a ruse merely to exert pressure on DASA's management.

As to his purpose in continuing this litigation after the sale was approved, Browning stated:

"We were trying to help this company to continue to operate and all I felt is that we should have a fair conversion price. It is as simple as that. We stated that if we didn't get it, that we would continue with litigation." (TT, p. 195)

The most telling admission of Browning, was given in response to a pointed question of DASA's counsel:

"Q. Given this position, the vital nature of the sale, the fact that litigation would be damaging to the company and everyone else, the shareholders and the debentureholders, is it your contention that this suit was commenced to force the management to reduce the conversion price; is that it?

"MR. BREWER: I respectfully submit that the complaint and relief requested speaks for itself and one of the reliefs requested was the lowering of the conversion price.

"A. We were not trying to throw the company into bankruptcy and, in fact --

"Q. That is not responsive to the question.

"A. I'm sorry, what is the question?

(Question read.)

"A. No, that is not the total reason for the suit. It was one step in a number of efforts that we had made to try to have the directors and officers of DASA Corporation treat the bondholders fairly. It was one step --

"Q. If DASA had reduced the conversion price to a figure you wanted the suit would not have been commenced; is that correct?

"A. I think that is fairly clear and stipulated in everything we presented, yes." (TT, p. 95)

It is on the basis of this record, as well as that of the other innumerable proceedings, with all of which Judge Owen was fully familiar, that he properly concluded that "... this action was instituted and maintained to use the court as a negotiating tool, without any factual or legal basis for the myriad allegations pleaded against so many parties in the 53 page complaint." (p. 15, January 1976 Decision).

Browning advances several interrelated arguments for this Court's consideration as a basis for reversing the award of attorneys' fees to Andersen. Without exception, they are legally irrelevant, factually unsubstantiated, or both.

Contrary to Brownings' initial assertion (Browning Br., pp. 7-8), attorneys' fees are clearly permissible in this case as being within the court's equitable discretion (see cases cited in the previous section, pp. 25-27). Brownings' defenses (Browning Br. pp. 8-12) that his former attorney Brewer has assumed full responsibility and further that he reasonably believed his claims have merit are irrelevant and at odds with his own testimony, as discussed above (supra, pp. 31-34). The cases cited by Browning on malicious prosecution and punitive damages are factually inapposite (Browning Br., pp. 13-16). Brownings' argument that he should not suffer as a result of his attorneys' procedural tactics over which he allegedly had no control, is belied by his testimony (cited above, pp. 30-32) and relevant legal authority (see, for example, Gazan v. Vadsco Sales Corp., supra at 568, cited above, pp. 29-30).

Contrary to the Brownings' contention (Browning Br. pp. 17-20), it is clear that an award of attorneys' fees is definitely permissible in litigation under the Federal securities laws on other than statutory grounds, and the absence of statutory authority is, as shown above (supra, pp. 28-29), no bar. Likewise, the Noerr-Pennington argument is inappropriate here (supra, pp. 25-27). In seeking reduced attorneys' fees, Browning cites no direct authority, relying instead upon cases arising under Rule 37, Fed.R.Civ.P., which are obviously inapposite.

Brownings' final appeal is for some allocation of liability between himself and his attorney, Bradley Brewer (Browning Br., pp. 25-30). This proposition was advanced below and appropriately not followed by Judge Owen in the exercise of his discretion (Memorandum and Order, dated January 3, 1977, p. 3). The only authority for such allocation are cases involving joint tortfeasors arising under the Federal securities laws or common law tort, neither of which are relevant in this case. Plaintiffs here are held liable for attorneys' fees, not as tortfeasors, but because on the basis of all of the evidence, Judge Owen found that in effect they had prosecuted this action "in bad faith, vexatiously, wantonly, or for oppressive reasons." If Browning seeks merely to reduce his ultimate liability, he is clearly free to pursue his remedies against his former counsel, as the court below noted. (July 1976 Decision, p. 3, n.4).

D. Andersen Is Entitled To Additional Interest, Double Costs And Attorneys' Fees For Having To Oppose All The Appeals Taken In This Action, Including The Instant Appeal

Andersen, together with the other principal defendants, DASA and The Bank of New York, have previously moved for an award of damages and double costs, including attorneys' fees, pursuant to Fed.R.App.P. 38 (See Affidavit of Beverly I. Katz, sworn to January 13, 1977). Inasmuch as these motions were denied by this Court without prejudice to our right to renew (Decision dated

February 15, 1977), Andersen seeks to do so at this time because of the egregious conduct of all plaintiffs in prosecuting appeals before this Court. As has already been documented by DASA (DASA Memorandum of Law dated January 12, 1977, pp. 5-7), plaintiffs have filed five appeals in this proceeding prior to the instant appeal, all of which plaintiffs have lost, because they were patently untimely, clearly not appealable or jurisdictionally deficient. The sixth and present appeal as discussed above, is equally meritless, particularly as regards Andersen, with respect to which plaintiffs have not even alleged much less established any wrongdoing.

Under these circumstances, double costs and attorney's fees, as well as additional interest on its judgment, should be awarded to Andersen for all the unnecessary expenses which it has incurred. 28 U.S.C. § 1912; Fed. R. App. P. 38. See Oscar Gruss & Son v. Lumbermens Mutual Cas. Co., 422 F.2d 1278, 1283-84 (2d Cir. 1970), where, in language most relevant here, this Court held:

"We have considered [appellant's] other arguments to us and none has the slightest merit. Indeed, after a full review of the record, we believe that most are far-fetched indeed. . . . In any event, we do not intend to dignify these and other makeweight arguments by separately discussing each one. Moreover, the net impression we get from the record is one of calculated delay and a thrashing about by [appellant] for theories - even of dubious or no value - to evade its obligations. . . . In any event, on the basis of the conduct of the appeal alone, we regard this as an appropriate case for invoking both 28 U.S.C. §

1912 . . . and F.R.A.P. 38. . . . In view of the superfluity of issues on appeal, the frivolity of almost all of them, and the briefing of many in a manner that simply ignored the abundant evidence supporting the determination of the jury and the judge, we exercise our discretion under the statute and rule as follows: [appellee] is awarded an additional four percent interest on the judgment appealed from, double costs on [appellant's] appeal, and \$7,500 in attorney's fees."

Similarly, in Furbee v. Vantage Press, Inc., 464 F.2d 835, 837

(D.C. Cir. 1972), it was held:

"In these circumstances . . . dismissal of the case by the District Court was certainly not abuse of discretion.

* * *

"Moreover, we deem [the] appeal from the order of dismissal to be, in the circumstances, utterly without merit and frivolous. The federal case law supporting [appellee] is unambiguous and unwaivering [sic]. Appellant was made fully aware of the cases Appellee chiefly relied on in a memorandum in support of defendant's motion to dismiss, filed with the District Court and reprinted in Appellant's brief. We find nothing in Appellant's argument on appeal which casts the remotest doubt on those cases. Notwithstanding the clear state of the law, [appellant] pressed his appeal, involving [appellee] in the inconvenience and expense of employing counsel to resist the appeal. Appellate courts are burdened by a heavy volume of business and the problem is needlessly aggravated when frivolous appeals are taken. Justice, we think, requires that the costs of this appeal, including the expense of printing Appellee's brief, and reimbursement for reasonable attorney's fees be awarded to [appellee]. F. R. App. Pro. Rule 38. See 28 U.S.C. § 1912."

Justice so requires here.

Andersen also requests this Court, under the authorities cited above, to include in such award double costs and attorneys'

fees incurred by it on the earlier appeals which similarly appear to have been undertaken by appellants for harassment value alone.

CONCLUSION

The judgment of the District Court dismissing all claims against Andersen and granting Andersen attorneys' fees should be affirmed.

Dated: New York, New York
March 28, 1977

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- - - - -x
BROWNING DEBENTURES' COMMITTEE, et al., :

Plaintiffs-Appellants

-against-

: AFFIDAVIT OF SERVICE
ON PERSON IN CHARGE

DASA CORPORATION, et al. :

Defendants-Appellee :

:

:

:

-x

STATE OF NEW YORK)

: ss.:

COUNTY OF NEW YORK)

JOHN LOVER

being duly sworn, says: I am

employed in the office of Breed, Abbott & Morgan, 1 Chase
Manhattan Plaza, New York, N.Y. 10005, attorneys for the
Defendant-Appellee Arthur Andersen in the above action.
& Co.

On the 28th day of March, 1977, I served
the annexed BRIEF OF DEFENDANT-APPELLEE ARTHUR ANDERSON
: & CO.

on the attorney(s) listed below by delivering the same to
and leaving the same with the person in charge of said office(s).

~~Jacobs Persinger & Parker, Esqs., 70 Pine Street, New York,
New York, 10005~~

~~Sullivan & Cromwell, Esqs. 48 Wall Street, New York, N. Y. 10005~~

Anderson, Russel, Kill & Olick, P. C. 630 Fifth Avenue, New
York, N. Y. 10020

Brewer & Soeiro, Esqs., 257 Park Avenue South, New York, New
York 10010

Sworn to before me this
28th day of March, 1977

EDNA G. WATROUS
NOTARY PUBLIC, State of New York
No. 24-9649550

Qualified in Kings County
Certificate Filed in New York County
Commission Expires March 30, 1978

John Lover
John Lover

UNITED STATES COURT OF APPEALS
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BROWNING DEBENTURES' COMMITTEE, et al.,

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: AFFIDAVIT OF SERVICE
ON PERSON IN CHARGE

DASA CORPORATION, et al.

Defendants-Appellee :

:

:

:

-----x

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

MICHAEL SICARI being duly sworn, says: I am
employed in the office of Breed, Abbott & Morgan, 1 Chase
Manhattan Plaza, New York, N.Y. 10005, attorneys for the
Defendant-Appellee Arthur Andersen in the above action.
& Co.

On the 28th day of March, 1977, I served
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York 10010~~

Sworn to before me this
28th day of March, 1977

Michael Sicari
Michael Sicari

Edna G. Watrous
EDNA G. WATROUS
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